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No. 51426-5-II

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II
SUPERIOR COURT NO. 16-2-04401-34**

FEDERAL NATIONAL MORTGAGE ASSOCIATION

Appellant,

vs.

RORY SKINNER, ROSEMARIE SKINNER,
OCCUPANTS OF SUBJECT LOT 6 REAL PROPERTY; and DOES 1-10,
Respondents

BRIEF OF APPELLANT

FEDERAL NATIONAL MORTGAGE ASSOCIATION

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I. INTRODUCTION

Federal National Mortgage Association (“Fannie Mae”), the Plaintiff in Thurston County Superior Court Case No. 16-2-04401-34, and the Appellant herein submits this opening Brief.

The appeal before this Court involves two parties and two investment properties. The investment properties consist of two sets of duplexes, each comprised of two units. The two sets of duplexes are separated by a driveway.

Appellant Fannie Mae took ownership of its duplex (Lot 6) on May 24, 2013, following a trustee sale and via a Trustee’s Deed Upon Sale. Prior to the trustee sale, the duplex was owned by Craig and Wendy Baldwin.

Respondents Rory and Rosemarie Skinner (the “Skinners”) purchased their investment property (Lot 7) in November 2006, with a Statutory Warranty Deed, and utilized it as a rental property.

After obtaining ownership of its duplex, Fannie Mae discovered that tenants of the Skinners occupied its duplex. In October of 2016, in order to remove any cloud on its existing title resulting from wrongful possession, Fannie Mae filed a Quiet Title and Ejectment action against the Skinners and the occupants of its duplex. The Skinners retained counsel who filed a notice of appearance, an answer to the complaint, and a third party complaint.

Subsequently, Fannie Mae filed a motion for summary judgment on its complaint, which was granted on August 25, 2017. The Skinners did not oppose the motion for summary judgment, and neither they nor their counsel attended the hearing. On December 13, 2017, the Skinners, represented by new counsel, filed a Motion to Vacate

the Judgment. On January 5, 2018, the trial court, although finding no defect with the procedures followed by Fannie Mae, granted the Motion to Vacate in whole with no award of terms or recovery of costs.

Fannie Mae asserts that the trial court abused its discretion in granting the motion to vacate the judgment. In the alternative, if the trial court's granting of the motion to vacate the judgment was not an abuse of discretion, Fannie Mae asserts that the trial court abused its discretion in not awarding Fannie Mae compensation for its costs incurred in obtaining the summary judgment, costs incurred in opposing the motion to vacate, and amounts spent in reliance upon the summary judgment, including funds paid to the tenants to vacate the property.

II. ASSIGNMENTS OF ERROR

Fannie Mae presents for the Court's review the following assignment of error: The trial court erred in entering the order of January 5, 2018, granting the Defendant/Respondent Skinners' motion to vacate the summary judgment, entered in favor of Fannie Mae, on August 25, 2017.

The issues pertaining to the assignment of error are:

1. Did the trial court abuse its discretion in vacating the judgment entered on August 25, 2017?
2. Did the trial court err in failing to award terms to Fannie Mae?

III. STATEMENT OF THE CASE

A. In the year 2006, two lots, then under common ownership, were sold to two purchasers in two separate transactions.

Curtis and Kristi Bidwell ("Bidwells"), are the former owners of two lots located in Tumwater– Lot 6 and Lot 7, as described below:

- “Lot 6” is the real property with Tax Parcel Number 49200000**600**, which is currently commonly known as 231 Blass Ave. SE, Tumwater, WA, and legally described as:

LOT 6 OF FUNK’S FAIR GROUND LOTS, AS RECORDED IN VOLUME 11 OF PLATS, PAGE 27; IN THURSTON COUNTY, WASHINGTON. CP 9, 204.

- “Lot 7” is the real property with Tax Parcel Number 49200000**700**, which is currently commonly known as 211 Blass Ave. SE, Tumwater, WA, and legally described as:

LOT 7 OF FUNK’S FAIR GROUND LOTS, AS RECORDED IN VOLUME 11 OF PLATS, PAGE 27; IN THURSTON COUNTY, WASHINGTON. CP 10, 204.

Each lot contains a duplex structure, consisting of two living units. CP 70, 71, 289, 292. In November 2006, the Bidwells sold their two lots. CP 9, 10, 204. The Bidwells sold Lot 6 to Craig and Wendy Baldwin. CP 9, 16, 204, 220. The Bidwells further sold Lot 7 to Rory and Rosemary Skinner. CP 10, 43, 205, 223.

The purchase transactions for the two lots were financed with two mortgage loans. CP 9, 10, 18-41, 45-68, 205, 226-250, 252-276. After the purchase transactions, the new owners of Lot 6 and Lot 7 took possession. However, each took possession of the other’s property. CP 10, 205.¹

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¹ For ease of reference, a chart of ownership, encumbrance, and possession for the two lots is provided at CP 11, 206.

B. Lot 6 property was foreclosed upon and conveyed to Fannie Mae. After taking title, Fannie Mae discovered that Lot 6 was occupied by the Skinner's tenants, and Fannie Mae filed a Quiet Title action.

Sometime after origination, the Baldwin's mortgage loan secured with Lot 6 went into default. CP 12, 206. On May 24, 2013, the appointed trustee completed the foreclosure sale on Lot 6, and Lot 6 was conveyed to Fannie Mae via a Trustee's Deed recorded June 5, 2013. CP 12, 80-81, 207, 285-287. Sometime after the trustee sale completed, Fannie Mae discovered that its Lot 6 duplex was occupied by tenants of the Skinners.

On October 31, 2016, Fannie Mae filed a complaint for Quiet Title and Ejectment against the Skinners and the occupants of Lot 6. CP 8-81. At the time of filing the Complaint, the Assessor's records showed (and continue to show) that the current owner and taxpayer of Lot 6 is Fannie Mae, while the prior owners are Craig and Wendy Baldwin. CP 70. At the time of filing the Complaint, the Assessor's records further showed (and continue to show) that the owners and taxpayers for Lot 7 are Rory and Rosemarie Skinner. CP 71.

C. In the Quiet Title action, the Skinners appeared through counsel and filed pleadings.

After the filing of Fannie Mae's Complaint for Quiet Title and Ejectment, the Skinners' attorney at the time, David Britton ("Attorney Britton"), accepted service of process for the Skinners. CP 86, 87. Thereafter, Attorney Britton, on behalf of the Skinners, filed a Notice of Appearance, an Answer to the Complaint, and a Third Party Complaint against Stewart Title Company. CP 88-93, 94-95, 99-182. Stewart Title

Company is the escrow agent, as well as the title insurance company, for the 2006 purchase transactions of Lot 6 and Lot 7. CP 102, 103, 106.

On May 31, 2017, after coordinating with Attorney Britton and counsels for Stewart Title Company, counsel for Fannie Mae selected a hearing date of August 25, 2017, for its motion for summary judgment on the Complaint. CP 494, 514, 518-521. Thereafter on June 2, 2017, counsel for Fannie Mae filed and served a Notice of Hearing for its motion for summary judgment, and the motion was subsequently filed and served on Attorney Britton and counsel for Stewart Title on July 24, 2017. CP 494, 514, 523.

Counsel for Fannie Mae did not receive a response to its motion for summary judgment. In the three-week period prior to the August 25, 2017 hearing, counsel for Fannie Mae reached out to Attorney Britton via emails, and Attorney Britton responded to one of the emails. Verbatim Report of Proceedings, August 25, 2017, at 3. At the hearing on the motion for summary judgment, Attorney Britton did not appear, and Fannie Mae's unopposed motion for summary judgment was granted. CP 296-300.

D. After obtaining a Quiet Title Judgment, Fannie Mae acquired possession of the Lot 6 duplex.

After obtaining a Quiet Title and Ejectment Judgment, and after the appeal period had expired, counsel for Fannie Mae received the first of a few telephone calls from one of the Skinners' tenants occupying the Lot 6 duplex. CP 514. On November 2, 2017, counsel for Fannie Mae mailed two cash-for-keys offers to the Lot 6 tenants, offering \$4,000.00 in cash to each unit's tenant, in exchange for vacating the premises on or before December 4, 2017. CP 515, 525-533. Thereafter, the cash-for-keys offers were

finalized, and the tenants vacated the Lot 6 duplex in exchange for receiving \$4,000.00 each, for a total of \$8,000.00. The Lot 6 duplex is currently vacant. CP 515.

E. The Skinners retained new attorneys and moved to vacate Fannie Mae's Summary Judgment.

On November 15, 2017, the Skinners filed a Notice of Withdrawal and Substitution of Attorney, wherein the Skinners replaced Attorney Britton with their current attorneys. CP 301-302. Within a day or two thereafter, Stewart Title Company filed its motion for summary judgment on the Third Party Complaint. 303-388. The Skinners new attorneys did not contact counsel for Fannie Mae at this time nor did they concurrently file any pleading indicating challenge to the prior entered judgment despite knowing or having reason to know that Fannie Mae was proceeding and incurring costs relevant to its ownership of Lot 6.

On December 13, 2017, approximately one month after substituting as the attorney of record, over three months after judgment was rendered, and approximately ten days after Fannie Mae's cash-for-keys transaction had been completed at a cost of \$8,000.00, the Skinners' new attorneys, without prior notice to counsel for Fannie Mae, filed a Motion to Vacate the Judgment that had been granted to Fannie Mae nearly four months before. CP 389-404.

F. The trial court vacated the Quiet Title Judgment, without allowing any oral argument, and without awarding any terms.

At the hearing on the Skinners' Motion to Vacate Judgment on January 5, 2018, the trial court granted the Skinners' Motion to Vacate Judgment. The Motion was granted in its entirety, without allowing oral arguments, without identifying any

procedural defect with the service or entry of the prior summary judgment, and without awarding any terms to Fannie Mae for costs incurred in obtaining the summary judgment, costs incurred opposing the motion to vacate, or amounts spent in reliance upon the award of summary judgment, including the \$8,000.00 paid to the tenants to vacate the property *after* new counsel had appeared in the case. CP 554-556. Verbatim Report of Proceedings, January 5, 2018, at 3-5. After the January 5, 2018, hearing, on January 30, 2018, Fannie Mae filed its Notice of Appeal. CP 557-564.

IV. ARGUMENT

G. A ruling on a Motion to Vacate is appealable and subject to the Abuse of Discretion Standard of Review.

Pursuant to Washington Rule of Appellate Procedure 2.2(a)(10), a party may appeal from an order granting or denying a motion to vacate a judgment. The standard of review for such an appeal is abuse of discretion. *Rosander v. Nightrunners Transp., Ltd.*, 147 Wn. App. 392, 403 (2008); *C. & Assocs. V. Swanson*, 41 Wn. App. 323, 325 (1985).

“A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or made for untenable reasons.” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69 (2010). “A decision is made for untenable reasons or based on untenable ground if the trial court applies an incorrect standard or relies on unsupported facts.” *Salas* at 669.

H. Washington case law distinguishes between vacating a default judgment and a non-default judgment, requiring consideration of different factors.

In moving to vacate the judgment entered in favor of Fannie Mae, the Skinners rely principally on the 1968 Supreme Court opinion issued in *White v. Holm*, 73 Wn.2d

348 (1968).² CP 396-397. However, such reliance is misplaced as the judgment at issue in *White* was a default judgment, not a summary judgment as is the present case.

The *White* Court expressed that a proceeding to vacate a “default judgment” is equitable in nature, and the relief needs to be administered with equitable principles. *White* at 351. When exercising discretion in considering a motion to vacate a default judgment, a court needs to be concerned with two primary and two secondary factors, which must be shown by the moving party. *White* at 352. However, the factors applicable when considering a motion to vacate a non-default judgment are different and a different standard applies.

In *Haller v. Wallis*, 89 Wn.2d 539 (1978), ten years after publication of *White*, the Supreme Court issued an opinion concerning the standard to be considered when vacating a non-default judgment.

Haller involved a judgment entered upon an attorney’s agreement or consent to a settlement, against his client’s wishes, which the *Haller* Court referred to as a “consent judgment.” The appellate courts have since interpreted the *Haller* ruling broadly as applying to non-default judgments, such as a summary judgment,³ and an order of dismissal,⁴ as further explained below.

As it had done in *White*, the Supreme Court in *Haller* started its analysis by discussing the proper discretion to exercise when considering a motion to vacate a

² The Skinners erroneously base their Motion to Vacate on the four factors applicable to a default judgment set forth in *White*. CP 396-397. The correct standard is that applicable to a non-default judgment, set forth in *Haller*.

³ The case of *Lane v. Brown & Haley*, 81 Wn.App. 102 (1996), applies the *Haller* standard to a summary judgment.

⁴ The case of *Barr v. MacGugan*, 119 Wash.App. 43, 78 P.3d 660(2003), analyzes applying the *Haller* standard to an order of dismissal.

judgment, and drew a distinction between a default judgment and a judgment by consent (a non-default judgment). In refusing to vacate the judgment, the *Haller* Court stated:

There is an obvious difference in the view which courts take of judgments by default and judgment by consent. In the one, the defendant has had no representation and no hearing, whereas in the other, the moving party has, usually with the aid of counsel, had the merits of his claim or defense examined and has agreed upon the disposition of the controversy.

If [the judgment] conforms to the agreement or stipulation, it cannot be changed or altered or set aside without the consent of the parties unless it is properly made to appear that it was obtained by fraud or mutual mistake or that consent was not in fact given, which is practically the same thing. It will not be set aside on the ground of surprise and excusable neglect. Neither is an error or misapprehension of the parties, nor of their counsel, any justification for vacating the judgment, although the counsel consented to it because deceived by fraudulent misrepresentation of third parties that his client was willing to pay the judgment. Erroneous advice of counsel, pursuant to which the consent judgment was entered is not ground for vacating it.

Haller at 544 (citing from 3 E. Tuttle, A Treatise of the Law of Judgments § 1352, at 2776-77 (5th ed. rev. 1925)).

The *Haller* Court also reiterated the definition of “irregularity,” within the meaning of CR 60(b)(1),⁵ “...[a]s the want of adherence to some prescribed rule or mode of proceeding; and it consists either in the omitting to do something that is necessary for the due and orderly conducting of a suit, or in doing it in an unreasonable time or improper manner.” *Haller* at 543, (civ. *Graves*, 52 Wash. 57, 59, 100 P. 164 (1909)).

The *Haller* opinion notably applied the definition of “irregularity” within the meaning of CR 60(b)(1), and significantly drew a distinction between the showing that must be made, in an application to vacate a default judgment, contrasted with, the showing that must be made, in an application to vacate a consent judgment.

⁵ “Irregularity” is a component of CR 60(b)(1).

I. The incompetence or neglect of a party's own attorney is generally not sufficient ground for relief from a judgment.

Civil Rule 60(b) authorizes relief from a judgment or order based on one or more, of the eleven reasons enumerated therein. Skinners have filed their Motion to Vacate under the authority of CR 60(b), specifically based on reasons (1), (5) and (11). CP 396. Subsections (b)(1), (5), and (11) provide as follows:

“(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;...
- (5) The judgment is void; ...
- (11) Any other reason justifying relief from the operation of the judgment...”

The law in Washington has long been that the incompetence or neglect of a party's own attorney is generally not a sufficient ground for vacating a judgment. Notwithstanding this long held rule, the Skinners argument is based primarily on the alleged negligence of their own counsel. In the Supreme Court case of *Winstone v. Winstone*, 40 Wash. 272 (1905), a husband attempted to vacate a divorce decree. Much like the Skinners argue here, the husband argued that his attorney did not notify him that his case had been set for trial, and did not file a motion to seek a new trial or set aside the divorce decree. *Winstone* at 273.

The Supreme Court held that “As a general rule, the act or omission of the attorney is the act or omission of the client. No negligence will be excusable in the former which would not be excusable in the latter.” *Winstone* at 274 (quoting Black, Judgments, § 341).

The opinions in *Winstone* and *Haller* are consistent in that when a party has been represented by counsel, the acts, omissions, neglect or incompetence of the attorney are generally not sufficient grounds for vacating a judgment. When a party has been represented by counsel, even if counsel acts with negligence, incompetence, and against the wishes of his client, a judgment *cannot* be vacated absent a showing of fraud or collusion.

J. A narrow exception to the general rule applies only in an extraordinary circumstance when an attorney surrenders a substantial right.

Two years after deciding *Haller*, the Supreme Court considered yet another motion to vacate judgment. However, in this case the party requesting vacating presented “extraordinary circumstances” in support of their request. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298 (1980).

Specifically, in *Graves*, the defendant/client learned as a result of a garnishment action that its attorney:

- did not oppose a motion for summary judgment seeking to impose vicarious liability on the client or attend the hearing;
- did not take the necessary depositions or gather evidence regarding the plaintiff’s injuries;
- appeared at trial and announced he was unprepared;
- entered into a series of stipulations at trial without the client’s participation;
- failed to present any evidence at trial, resulting in a \$131,200 judgment against the client; and
- did not advise the client of any of the foregoing.

Graves at 300.

The Supreme Court in *Graves* found the acts and omissions of the defendant's attorney to be extraordinary and startling. *Graves* at 301. The Court concluded that summary judgment on vicarious liability had been legally improper because the moving party had failed to meet his burden on the issue of vicarious liability in the first place, and that the attorney had improperly entered into stipulations, without the consent of the client, that surrendered substantial rights of the client. *Graves* at 302, 303.

The *Graves* Court reiterated that generally once a party has designated counsel, other parties are entitled to rely upon that authority, but noted that if an attorney consents to a surrender of substantial rights, contrary to a client's wishes, that surrender may be ground for vacating a judgment. *Graves* at 1227.

While the Supreme Court in *Graves* carved an exception to the general rule, the exception is limited to extraordinary circumstances in which an attorney has surrendered a substantial right of the client. *Graves* at 303. In this case, no extraordinary circumstances have even been alleged and no substantial right was surrendered to support relief from judgment.

K. The trial court abused its discretion in vacating the judgment based on "irregularities" in representation.

The Skinners' Motion to Vacate the Judgment enumerates and rests on CR 60(b) subsections 1, 5 and 11. CP 396. In support of said subsections, the Skinners advance three arguments with the following headings:

"1. The Skinners are Entitled to Vacate the Judgment due to Irregularities in Their Representation." CP 397.

“2. The Skinners are Entitled to Vacate the Judgment due to an Invalid Trustee Sale.” CP 398.

“3. The Skinners are Entitled to Vacate the Judgment due to Scrivener’s Error or by Virtue of Mutual Mistake.” CP 401.

The Skinners’ first argument, with the heading “The Skinners are Entitled to Vacate the Judgment due to Irregularities in Their Representation,” states that Attorney Britton did not notify them of Fannie Mae’s motion for summary judgment, did not respond to the same, and did not notify them of the result of the hearing. CP 397-398.

Since the Skinners were represented by Counsel, and the judgment vacated is a “non-default judgment,” the standards of *Haller* apply.⁶ The general rule is that if an attorney is authorized to appear, and the jurisdiction over the defendant is perfect, then the subsequent action of the attorney, not induced by the fraud of the adverse party, is binding on the client. *Haller* at 547 (quoting from 3 E. Tuttle, *A Treatise of the Law of Judgments* § 1252, at 2608 (5th ed. rev. 1925)).

Skinners contend that Attorney Britton’s conduct consisting of: not having notified them of the motion for summary judgment, not having responded to the same, not having attended its hearing, and not having informed them of the result of the hearing, constitutes “irregularity” under CR 60(b)(1). CP 397. Attorney Britton’s actions regarding the motion for summary judgment however, appear to be based on his assessment of the merit of Fannie Mae’s case, and his strategy in pursuing the Skinners’ rights.

⁶ The Skinners erroneously base their Motion to Vacate on the four factors applicable to a default judgment set forth in *White*. CP 396-397. The correct standard is that applicable to a non-default judgment, set forth in *Haller*.

Attorney Britton had filed a Third Party Complaint against the title insurance company, seeking to protect the Skinners' rights under their title insurance policy, and Attorney Britton's assessment of the merit of Fannie Mae's case can be surmised from the admission made in the Third Party Complaint against Stewart Title Company, which states: "The Skinners have asserted several defenses, but, (without waiving those defenses), believe that it is extremely unlikely that FNMA will fail to quiet title to 231/241 Blass Avenue." CP 106.

Attorney Britton, appearing to believe that Fannie Mae's complaint had merit, chose to not oppose Fannie Mae's motion for summary judgment, and pursued the Third Party Complaint against the title insurance company instead. At the time that Fannie Mae's motion for summary judgment was granted, the Third Party Complaint against the title insurance company was pending, and it continues to proceed against various third party defendants.

If Attorney Britton believed that Fannie Mae's case has merit, then his decision not to respond to the motion for summary judgment and not attend its hearing constitutes chosen strategy to pursue a course of action with more likelihood of success, i.e., the Third Party Complaint against the third party defendants, all of whom were involved in the 2006 purchase transactions, and one of which provided a policy assuring that Skinners had title to their purchased property.

Conversely, if Attorney Britton did not believe that Fannie Mae's case has merit, (while the record before this Court shows that he did believe in the merit), then Attorney Britton's actions arguably amounted to neglect or incompetence, but they did not constitute irregularity under CR 60(b)(1), for the reasons set forth below.

The Skinners also argue that Attorney Britton's failure to notify them of the summary judgment hearing constitutes "irregularity." The Supreme Court in *Haller* visited this issue and determined that "...[n]otice to a client that his attorney is making application to the court for some action on its part, is not a requirement of court rule and there has been no showing that it is a requirement of due process." *Haller* at 547.

Similarly, the Supreme Court in *Winstone*, where a husband attempted to vacate a divorce decree, on the grounds that his attorney did not notify him that his case had been set for trial, and did not file a motion to seek a new trial or set aside the divorce decree, reasoned that there were no allegations of fraud or collusion between the appellant's attorney and the respondent in that case, and what was before the Court was simply allegations of neglect on the part of the husband's attorney. *Winstone* at 274. The Supreme Court in *Winstone* affirmed that "As a general rule, the act or omission of the attorney is the act or omission of the client. No negligence will be excusable in the former which would not be excusable in the latter." *Id.*, (quoting Black, Judgments, §341).

Even the Court in *Graves*, in examining the attorney's failure to notify his client of the motion for summary judgment, failure to respond or attend its hearing, and failure to notify the client of the result, did not reach the conclusion that such failures constituted irregularity. The conduct of Attorney Britton may constitute choice of strategy, or neglect or incompetence, but it does not constitute irregularity, as the courts have interpreted within the meaning of CR 60(b)(1). As a general rule, the acts or omissions of a party's own counsel are attributed to the client. *Winstone* at 274.

The *Haller* ruling has been interpreted to broadly apply to non-default judgments, including a summary judgment. The division two appellate case of *Lane v. Brown & Haley*, 81 Wn.App. 102 (1996), involves another personal injury action, in which Mr. Lane fell down the stairs at Brown & Haley's facility, and filed lawsuit. Mr. Lane was represented by counsel and Brown & Haley moved for summary judgment, essentially arguing that it did not have notice of the stair's condition. *Lane* at 104.

Mr. Lane's attorney appeared at the hearing on the motion for summary judgment and argued in opposition, albeit unsuccessfully. The trial court granted Brown & Haley's motion for summary judgment. *Id.* Mr. Lane then retained new counsel and moved to vacate the summary judgment, and offered affidavits of witnesses who stated that they had knowledge of the stair's defective condition. *Lane* at 105.

On appeal Mr. Lane's arguments were twofold: first, Mr. Lane argued his attorney failed to inform him of the summary judgment proceeding, and that constituted an irregularity in obtaining a judgment, which warranted vacating the judgment under CR 60(b)(1). Next, Mr. Lane argued that his attorney surrendered his substantial rights, without his authorization, warranting that the summary judgment be vacated under CR 60(b)(11). *Lane* at 106.

The appellate court in *Lane* first acknowledged that vacating a default judgment is governed by a different standard than vacating a judgment on the merit, and disregarded Mr. Lane's provided authority applicable to a default judgment. *Lane* at 105, 106. Next, the *Lane* court addressed the argument that Mr. Lane's attorney did not notify him of the summary judgment proceeding, and held per *Haller*, client notice is not a court requirement, and failure to give notice of a summary judgment proceeding does not

constitute irregularity, thus, relief is not available under CR 60(b)(1) based on irregularity. *Lane* at 106.

Then, the *Lane* court examined Mr. Lane's second argument that his attorney had surrendered a substantial right, under *Graves*, and further under CR 60(b)(11), by not investigating and not introducing possible sources of evidence and witnesses (that his new attorney had gathered), for the summary judgment hearing.

The *Lane* court analyzed that "The use of CR 60(b)(11) "should be confined to situations involving extraordinary circumstances not covered by any other section of the rule." *Lane* at 107, (citing from *Gustafson v. Gustafson*, 54 Wn. App. 66, 75, 772 P.2d 1031 (1989) (internal quotation omitted)).

Then the *Lane* court applied the *Graves* standard, and concluded that Mr. Lane's reliance on *Graves* was misplaced because in *Graves* the attorney had entered into a series of stipulations without authorization from his client, and Mr. Lane's attorney had not entered into any stipulation with Brown & Haley. Instead, for whatever reason, Mr. Lane's attorney had neglected or refused to investigate possible sources of evidence and witnesses, choosing to rely on an erroneous legal theory. *Lane* at 107, 108.

The court's analysis in *Lane* is on point, as it examines both the standards of *Haller* and *Graves* with respect to a motion for summary judgment, in which the attorney did not notify his client of the proceeding, and did not utilize the legal theory that his client's subsequent attorney wished to utilize.

The *Lane* court scrutinized that failure or neglect to utilize a particular legal theory does not rise to the level of surrender of substantial rights, under *Graves*. *Lane* at 108. The *Lane* court further asserted that violation of the Rules of Professional Conduct,

by failing to keep a client informed, does not provide sufficient ground for vacating a judgment. *Lane* at 108, 109. The general rule is that a client is bound by the actions of his or her attorney. *Lane* at 109.

Equally importantly, the *Lane* court applied the logic of *Haller* to a motion for summary judgment, stating that:

“We follow *Haller* and apply its well-reasoned logic to this case: (1) the law favors finality, 89 Wn.2d at 544; (2) erroneous advise of counsel, error of counsel, surprise, or excusable neglect are not grounds to set aside a consent judgment (a settlement approved in court), 89 Wn.2d at 544; (3) fraud provides the grounds to vacate nondefault judgments, 89 Wn.2d at 546; (4) attorney mistake or negligence does not provide an equitable basis for relief of the client, 89 Wn.2d at 547; (5) notice to the client of upcoming action in court is not a requirement of court rule, 89 Wn.2d at 547.” *Lane* at 109.

Similar to the *Lane* case, here, Attorney Britton’s failure to notify his client of the motion for summary judgment and failure to utilize a particular legal theory did not constitute irregularity under CR 60(b)(1), as interpreted by *Lane*, and did not rise to the level of surrender of a substantial right, under *Graves* and *Lane*.

Next, in support their premise that an “irregularity” exists, the Skinners cite the case of *Barr v. MacGugan*, 119 Wash.App. 43, 78 P.3d 660 (2003). CP 397. *Barr* involves yet another personal injury action, in which plaintiff Barr was injured in an automobile accident, and filed a lawsuit. Barr’s attorney failed to respond to discovery requests, which ultimately resulted in the dismissal of the lawsuit with prejudice. *Barr* at 45. After the dismissal, Barr discovered from her attorney’s landlord, that her case had been dismissed, and that her attorney had been suffering from severe clinical depression, which caused him to neglect his practice. *Id.* Barr retained new counsel and successfully moved to vacate the dismissal. *Id.*

On appeal, McGugan relied on *Haller* for the general rule that an attorney's negligence or neglect does not constitute grounds for vacating a judgment under CR 60(b), because if an attorney is authorized to appear on behalf of a client, the attorney's acts are binding on the client, thus, the attorney's negligence is attributable to the client. *Barr* at 46 (internal citations omitted).

The *Barr* court acquiesced in the general rule, but reasoned that severe clinical depression is a mental illness, and Washington courts, while addressing attorney incompetence, error or neglect, have not addressed the circumstances in which an attorney's mental illness or disability can constitute grounds for vacating a judgment under CR 60(b). *Barr* at 46, 47.

The fundamental flaw with use of *Barr* and the cases cited therein in support of the Skinners' Motion to Vacate is that in *Barr* the client had obtained and offered evidence of her attorney's severe clinical depression as a ground for vacating the dismissal. Therefore, the *Barr* court considered the severe clinical depression as a ground for the motion to vacate. The Skinners here have not offered any evidence even hinting that Attorney Britton suffered from depression or any mental illness whatsoever. There is no record before this Court of any reference to Attorney Britton's mental, psychological, or personal issues, if any existed.

Counsel for Fannie Mae respectfully submits that there is no need to further analyze the *Barr* case and the cases cited therein, because *Barr's* ruling applies specifically and solely to a case where the attorney suffered from severe clinical depression. The trial court erred in vacating the judgment on the grounds stated in the

Skinner's Motion to Vacate as *Barr* neither supports nor applies to vacating the judgment here.

L. The trial court abused its discretion in vacating the judgment based on “invalid trustee sale.”

The Skinners' second argument asserts that the trustee sale by which Fannie Mae took title to Lot 6 is invalid because the Notice of Default and Notice of Sale were transmitted to the 211/221 Blass Avenue address, and not the 231/241 Blass Avenue address, thus the trustee failed to comply with statutory notice requirements. CP 398-401.

This argument appears to have been offered in support of the “Void Judgment” ground set forth in CR 60(b)(5). However, the Skinners have not alleged a wrongful foreclosure or sought to set aside the foreclosure in their counterclaims, nor have they joined the necessary party of the foreclosure trustee in any of their counterclaims, and thus this argument cannot now be considered on a motion to vacate the properly entered summary judgment.⁷

Unlike the cases that the Skinners cite in support of their argument, in the instant action, the Skinners have failed to file a cause of action for wrongful foreclosure or to set aside the sale, and have further failed to join the necessary parties for such a cause of action, which are the foreclosure trustee, Northwest Trustee Services, Inc., and the foreclosing entity, Green Tree Servicing, LLC, (now known as Ditech Financial, LLC).

Even if the Skinners' attempt to further amend their Counterclaims and add a wrongful foreclosure claim or seek to set aside the sale and join the proper parties, the

⁷ Skinners' Counterclaims against Fannie Mae consist of: Quiet Title, Reformation of Contract, Equitable or Constructive Trust or Lien, Unjust Enrichment, Equitable Estoppel and Quasi Contract. CP 486.

trustee sale of 2013 still cannot be set aside. The Deeds of Trust Act promotes finality and stability of land titles. Prior to completing a trustee sale, the Deeds of Trust Act provides a liberal mechanism to challenge a trustee sale on any reasonable ground and enjoin it. After a trustee sale has completed, however, the Deeds of Trust Act in RCW 61.24.127 restricts challenges to a trustee sale to a handful of possible claims, which claims must be brought within two years of the sale date or earlier, and such claims may only seek monetary damage, and cannot affect the validity or finality of the foreclosure sale in any way. RCW 61.24.127

The 2013 trustee's sale was more than three years old at the time of filing the complaint in the instant case,⁸ and the arguments raised concerning the sale are insufficient to support any argument disturbing the finality of sale. Therefore, the Skinners cannot quiet title to Lot 6 based on their defense of "invalid trustee sale." To the extent that any part of the trial court's decision to vacate summary judgment was based on an alleged invalid sale, such was a clear abuse of discretion not supported by law or fact.

M. The trial court abused its discretion in vacating the judgment based on "scrivener's error or mutual mistake."

The Skinners' last argument asserts the Skinners desire to reform the Trustee's Deed to change the legal description therein. The Skinners' state "Finally, a deed, including a Trustee Deed, may be "reformed" on account of the parties' "mutual mistake of fact..." CP 401.

⁸ The May 2013 trustee sale was over four years old at the time the Motion to Vacate was filed in December 2017.

The remedy of scrivener's error or mutual mistake does not justify relief under CR 60(b)(1), (5) or (11), as it does not constitute irregularity in representation, void judgment, or an extraordinary circumstance justifying relief. Moreover, the Skinners' pursuit of scrivener's error or mutual mistake remedy cannot result in reformation of Fannie Mae's Trustee's Deed Upon Sale. Reformation is not available to non-parties to a contract or written instrument, as the required elements of a reformation cannot possibly be satisfied.⁹ There is no contract or written instrument to which the Skinners and Fannie Mae are parties. This argument fails and the trial court erred in vacating the judgment based on any alleged scrivener's error of the Trustee's Deed.

N. The trial court further erred in not awarding any terms.

At the January 5, 2018, hearing on the Skinners' Motion to Vacate, the trial court stated this opinion on the record:

"I am not going to hear oral argument on this this morning. I am going to grant the requested relief in whole. **I am going to grant it on the bases of each of the bases articulated by the homeowners, as well as construing Civil Rule 1, which required that all other rules be construed to serve the ends of justice.**

I will note for the record that when this came around the first time, I, in an uncharacteristic manner for myself, expressed great dismay and surprise at the facts on the ground in this case and the fact that it was unopposed at that matter. This was greatly concerning to the Court.

I am not going to allow this case to not proceed to a merits issue given that there are a multitude of miscarriages of justice that appear to have occurred throughout this case. The Court is very concerned.

I am going to urge the parties to look closely at this to see what can be done so this doesn't come back to court again. I will leave it at that."

Verbatim Report of Proceedings, January 5, 2018, at 4 (emphasis added).

⁹ The elements of reformation are listed at *Krystal v. Davis*, 2011 Wash.App. LEXIS 1341 at * 10, 11, (citing from 27 Richard A. Lord, *Williston on Contracts* § 70:23, at 264-65 (4th ed. 2003)).

There is no allegation or evidence in the record that the failure of the Skinners' counsel (who had admitted that it was "extremely unlikely that FNMA will fail to quiet title to 231/241 Blass Avenue") to oppose the motion for summary judgment or to appear at the hearing was in any way the fault of Fannie Mae. The record is also devoid of any evidence of "miscarriages of justice" appearing in this case. Fannie Mae properly filed its complaint, properly sought summary judgment, and properly was granted summary judgment.

Since gaining ownership of Lot 6 in May 2013, Fannie Mae has been unable to have the use and benefit of Lot 6, for about five years now, due to the Skinners' wrongful possession of Lot 6. CP 495. Meanwhile, the Skinners' have had the benefit of the stream of income that Lot 6 tenants provided to the Skinners, since before 2013, and until December 2017. CP 494, 495, 514.

Fannie Mae has further incurred attorney fees to commence and litigate an action to remove any cloud on its existing title, as a result of the Skinners having wrongful possession of Lot 6 property. Over a year after Fannie Mae had started the litigation, the Skinners moved to vacate Fannie Mae's summary judgment based on the conduct of their own counsel. Given that Fannie Mae has incurred the loss of the use of its property for approximately five years, and Fannie Mae has incurred attorney fees in pursuing a motion for summary judgment, and Fannie Mae has incurred a cash-for-keys transaction to vacate the Lot 6 premise, how is justice served by placing all the financial burden for vacating a summary judgment on Fannie Mae?

When vacating a judgment, CR 60(b) authorizes "such terms as are just," and the Supreme Court in *Graves* has specifically decided the issue of "what costs are to be

imposed when vacating a judgment.” If the actions and omissions of Attorney Britton, extended beyond the threshold of incompetence or neglect, and rose to the elevated standard of having surrendered a substantial right, which Fannie Mae contends they did not, then the Supreme Court in *Graves* has clearly held that:

The question then arises as to who should pay the expense of litigation which have been needlessly incurred. The plaintiff certainly should not suffer as a result of the errors of defendant’s attorney. The Court of Appeals therefore directed that terms should be assessed against the defendant to place the plaintiff in the same position he would be in had the efforts of litigation which have been nullified never been conducted. We agree.

Graves at 306.

In its opposition to the Skinners’ Motion to Vacate, Fannie Mae brought to the trial court’s attention all the harm it had suffered and would continue to suffer as a result of the Motion to Vacate, which harm consists of:

- Fannie Mae incurred \$3,870.00 in attorney fees in connection with its motion for summary judgment; CP 509, 515.
- Fannie Mae incurred \$3,225.00 in attorney fees to oppose the Skinners’ Motion to Vacate; CP 509, 515
- Fannie Mae incurred \$8,000.00 in cash-for-keys offer to the Skinners’ two tenants who occupied the Lot 6 duplex. CP 510, 515

A total of \$15,095.00 has been incurred in connection with the motion for summary judgment, opposing the Motion to Vacate and the cash-for-keys transaction. The \$8,000.00 cash-for-keys transaction, in particular, has been damaging to Fannie Mae, and could have been avoided.

The Skinners' current counsel filed their Notice of Withdrawal and Substitution of Counsel with the trial court on November 15, 2017, (CP 301-302), and filed their Motion to Vacate on December 13, 2017. CP 389-404. During the approximately one month period between the time that current counsel officially substituted in, and the time of filing their Motion to Vacate, the record is void of any communication, from the Skinners' current counsel regarding their intention to disturb Fannie Mae's judgment.

During that one month period, Fannie Mae completed its cash-for-keys transactions for \$8,000.00, and the tenants vacated the Lot 6 duplex on or before December 4, 2017, resulting in a vacant property, for which security and maintenance Fannie Mae is responsible. CP 494, 515. If counsel for Fannie Mae had received any communication from the Skinners' counsel regarding their intention to file a Motion to Vacate, prior to such filing, counsel for Fannie Mae would have halted the cash-for-keys process. It is inherently unjust, as well as incongruent with *Graves'* ruling, to place the financial burden resulting from the Skinners' counsel's conduct on Fannie Mae.

V. CONCLUSION

In conclusion, Fannie Mae respectfully requests that the Court reverse the trial court's ruling vacating the summary judgment, and remand.

MCCARTHY HOLTHUS, LLP

Dated: May 25, 2018

/s/ Kathy Shakibi
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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2018, I electronically filed the foregoing **BRIEF OF APPELLANT, FEDERAL NATIONAL MORTGAGE ASSOCIATION**, and this Certificate of Service, with the Clerk of the Court, using the Washington State Appellate Court's Portal for e-filing, which will serve electronic copies of such filing on the following attorneys of record:

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Dated this 25th day of May, 2018

By: /s/ Kathy Shakibi
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MCCARTHY & HOLTHUS, LLP

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